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In The

Supreme Court of the United States

October Term, 1989

JEFFREY ALAN WALTON,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Supreme Court For The State Of Arizona

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ARIZONA AND NATIONAL JURY PROJECT IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.3 of the rules of this Court, *amici* respectfully request leave to file the attached brief of *amici curiae* in support of petitioner. Although petitioner has consented to the filing of this brief, respondent has refused to consent to the filing.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization with over 275,000 members. The ACLU was established to defend our Bill of Rights and has been continuously active toward that end. The ACLU is dedicated to advancing the civil rights and individual liberties of the people of the United States. The American Civil Liberties Union of Arizona is a local affiliate of the ACLU.

The National Jury Project is a corporation which engages in extensive research into a variety of areas and issues relating to the American jury system. One of the purposes of the National Jury Project, as reflected in its bylaws, is to conduct studies of the jury system for parties and legal counsel in civil and criminal cases, including cases involving the defense of human and civil rights as protected by law.

The brief proposed for submission by *amici* addresses the issue whether Arizona's death penalty statute violates the Sixth Amendment by denying a jury trial on the factual elements of capital murder specified by Arizona law. This Court has not previously considered, under the Sixth Amendment, the validity of a state statutory scheme which absolutely denies a homicide defendant the right to have a jury make the factual findings necessary under state law to authorize imposition of the death penalty. This important question of first impression deserves the fullest examination and explication possible.

While the historical development of concepts embodied in the Bill of Rights is often a consideration in the

cases which come to this Court for review, such concerns play a particularly important role in cases implicating the Sixth Amendment. As this Court's opinions show, the decision of Sixth Amendment issues regularly turns on the understanding of the jury trial right held by the framers of our Constitution. *See, e.g., Duncan v. Louisiana,* 391 U.S. 145 (1968). The decision in this case, likewise ought to be informed by as full and complete an understanding of historical foundations for the jury trial right as possible.

Amici, with long traditions of constitutional interpretation, are best suited to provide this Court with the historical context necessary to resolve the Sixth Amendment issue in this case.

The brief which *amici* propose to submit traces the jury trial right from its inception in medieval England through its installation as one of the cornerstones of our Bill of Rights. The brief examines the evolution of the law of homicide, and demonstrates the important role played by the jury in murder cases throughout the centuries. Based on this historical analysis, *amici* submit a test for use in determining when and under what conditions factual determinations which make eligible a homicide defendant for capital sentencing amount to elements of the crime of capital murder, for which the Sixth Amendment demands jury decision. Applying this test, *amici* argue that petitioner's death sentence, imposed by a judge without any jury participation whatsoever, violates the Sixth Amendment.

The briefs on the merits filed by the parties to this proceeding may address certain aspects of the historical underpinnings of our jury trial right. Nevertheless, given the number of issues presented by this case and the page limitations imposed by this Court, it is unlikely that either party will be able to fully treat the historical analysis *amici* believe this matter requires. Pursuant to Rule 36.3 of this Court's rules, *amici* therefore request leave to file the attached brief of *amici curiae* American Civil Liberties Union, American Civil Liberties Union of Arizona and National Jury Project in support of petitioner.

Respectfully submitted

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 275,000 members dedicated to defending the Bill of Rights and advancing the civil rights and individual liberties of the people of the United States. The American Civil Liberties Union of Arizona is one of the ACLU's affiliates.

The National Jury Project is a corporation which engages in extensive research into a variety of areas and issues relating to the American jury system. One of the purposes of the National Jury Project, as reflected in its bylaws, is to conduct studies of the jury system for parties and legal counsel in civil and criminal cases, including cases involving the defense of human and civil rights as protected by law.

This case presents the question whether a capital defendant has the constitutional protection of a trial by jury on the essential elements of capital murder. *Amici* believe that persons accused of capital murder possess a fundamental constitutional right to be tried by a jury, and that the decisions of this Court support the recognition of this right in the instant case. Accordingly, we submit this brief in support of Petitioner, and we urge the Court to reverse the decision of the court below.

SUMMARY OF THE ARGUMENT

In this brief, *amici* address only one of the several questions presented for review in this case, specifically, whether Arizona's death penalty statute violates the Sixth

Amendment by denying a jury trial on the factual elements of capital murder specified by state law. *Amici* support the petitioner's position that this question must be answered in the affirmative.

This Court's decisions establish the significance to Sixth Amendment analysis of the historical concerns that led to the adoption of the jury trial right by the framers of the Constitution. Based on an historical review of the jury's traditional fact-finding role in homicide cases, *amici* propose a test for deciding when a capital defendant has a Sixth Amendment right to jury determination of facts which authorize the ultimate penal sanction – death.

Throughout the history of the English and American criminal justice systems, the jury has represented the conscience of the community. As the law evolved, the jury's role in the criminal justice system became more clearly defined. By the time our Bill of Rights was adopted, the jury's broad authority to determine the facts in homicide cases was well established. The framers' contemporary understanding of the jury's role informs the now familiar maxim that the Sixth Amendment right to jury trial necessarily includes the right to have a jury determination with respect to every element of the criminal charge.

This Court has twice held that a capital defendant does not have a constitutional right to jury sentencing. *Spaziano v. Florida*, 468 U.S. 447 (1984); *Hildwin v. Florida*, 109 S.Ct. 2055 (1989). This Court has also held that a criminal defendant is not always entitled to a jury determination as to the facts that lead to an enhanced sentence. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). None

of these cases, however, address the specific issue presented here: Whether a capital defendant has a Sixth Amendment right to jury decision of the facts constituting the aggravating circumstances of the crime, which make the defendant eligible for the sentence of death.

Clearly, the Constitution does not require jury input into every facet of the sentencing decision. It is equally clear, however, that states may not withdraw from jury determination elements of a crime by simply redefining such elements as sentencing considerations. In order to resolve the tension inherent between these two concepts, *amici* submit the following test: Facts which lead to an enhanced sentence must be viewed as elements of an offense for which a jury determination is required if two conditions are met. First, the facts relate to the circumstances of the crime rather than the character of the offender; second, proof of the facts makes possible a significantly enhanced sentence. When the aggravating factors which authorized petitioner's death sentence are considered under this test, it is clear that they constitute elements of the crime of capital murder under Arizona law, and that petitioner's Sixth Amendment rights have been violated.

ARGUMENT

Arizona's Death Penalty Statute Violated Petitioner's Sixth Amendment Right to Jury Trial

In *Duncan v. Louisiana*, 391 U.S. 145 (1968) this Court held that the Sixth Amendment right to jury trial is essential to our scheme of justice. *Duncan* concluded that

"[t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 155. This Court has indicated that the scope of the constitutional right to jury trial must be determined by analyzing the historical concerns that led to that provision's adoption. *See, e.g., Williams v. Florida,* 399 U.S. 78, 86-87 (1970); *Duncan v. Louisiana,* 391 U.S. at 151-154. In *Williams,* for example, the Court stated that in determining whether a particular feature of jury trial (in that case the number of jurors) is constitutionally required "[t]he relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." 399 U.S. at 99. Thus, the purposes historically served by the jury should be of particular relevance in defining the scope of the jury's fact-finding authority.

This Court explained those purposes in *Duncan,* when it observed that the jury trial provisions "reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt and innocence." *Id.* at 156. In short, the jury's essential role is to prevent government oppression by serving as a buffer between the government and the individual.

Historically, the jury has fulfilled this role primarily by serving as the final arbiter on all questions of fact.[1] In 1765, Sir William Blackstone, an authority who had enormous influence on the framers of the Constitution and the Bill of Rights[2] referred to the English jury as "the grand palladium of English liberty." In delineating the jury's authority, he distinguished between questions of fact and questions of law, explaining that "the principles and axioms of law . . . should be deposited in the breasts of the judges. . . . But in settling and adjusting a question of fact . . . a competent number of sensible and upright jurymen . . . will be found the best investigators of truth and the surest guardians of public justice." 4 W. Blackstone, *Commentaries* *350. Twenty-two years later, E. Wynne, an English commentator, stated the point more emphatically: "All that I have said or have to say upon the subject of Juries, is agreeable to this established maxim: 'that Juries must answer to questions of Fact and Judges to questions of Law.' This is the fundamental maxim acknowledged by the Constitution." E. Wynne, 3

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[1] The historical analysis contained in this brief is elaborated at greater length in White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial,* 65 Notre Dame L. Rev. 1 (1989)

[2] For example, John Adams, Nathaniel Green, James Madison, Alexander Hamilton, John Jay and Patrick Henry all read and acknowledged the authority of Blackstone's *Commentaries. See* Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact,* 51 N.Y.U. L. Rev. 731, 743-45 (1976). *See also* B. Mitchell & L. Mitchell, *A Biography of the Constitution of the United States* 22 (1964).

Eunomies: Dialogues Concerning the Law and Constitution of England 217 (2d Ed. 1785). Later authorities echoed this view of the jury's role.[3]

A. The Historical Understanding of the Jury's Role in Criminal Cases

(1) The Jury's Fact-finding Role in Homicide Cases

The original basis for the jury's role as fact-finder was that the jurors were the only ones who knew the facts. As Professor Thomas Green has shown, "[t]he early English jury was self-informing and composed of persons supposed to have first-hand knowledge of the events and persons in question. The judge instructed the jury on the law, but was himself almost entirely dependent upon the

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[3] *See, e.g., United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (opinion by Story, J.) ("I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law."). *See generally* J. Proffatt, *A Treatise on Trial by Jury* 318-19 (1880).

Most recently, this Court reversed a conviction on Due Process grounds, holding that jury instructions creating conclusive presumptions wrongfully eliminated the prosecution's burden of proving all elements of the crime charged. *Carella v. California*, 109 S.Ct. ___, 105 L.Ed.2d 218 (1989). Quoting the language from *Duncan v. Louisiana* cited earlier in this brief, Justice Scalia noted that the constitutional inadequacy inherent in conclusive presumptions stems not only from interference with the concept of the presumption of innocence, but also that a conclusive presumption " 'invade[s] [the] factfinding function' which in a criminal case the law assigns solely to the jury. . . ." *Id.* at ___, 105 L.Ed 2d at 223 (Scalia, J., concurring). (quoting *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979)).

Jury for his knowledge of the case." Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. 414, 421 (1976) (hereinafter Green I).

During the sixteenth and seventeenth centuries, the modern criminal trial evolved. By the end of this period, witnesses testified to evidence in a court presided over by a judge. After being charged by the judge, the jury returned its verdict based on the evidence presented. Because the jurors no longer had personal knowledge of the facts, the Crown's power to control or influence jury verdicts increased. Professor John Langbein's examination of seventeenth century criminal trials indicates that judges sometimes exercised this power by essentially directing a guilty verdict or refusing to accept the jury's not guilty verdict. *See* Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263 (1978) (hereinafter Langbein, *Criminal Trial*). Moreover, when the jury was recalcitrant, judges sometimes resorted to even sterner measures. On occasion, juries were threatened with fines or even imprisonment if they failed to return the verdict sought by the Crown. *See* 4 W. Blackstone, *Commentaries* *361. Thus, although the jury technically retained its authority to determine the facts, in practice judges had the means of restricting their fact-finding authority.

By the end of the seventeenth century, primarily due to a number of polically charged cases, tension between judges and juries heightened. While the heightened tension was particularly obvious in trials involving seditious libel or other political offenses, it was also evident in homicide cases. For example, when Chief Justice Kelyng was charged with improper judicial conduct in 1667, three of the matters charged against him related to his

coercion of juries in homicide cases. For example, in one case where "a master's helper had beaten a boy 'about the head with a broomstaff' for doing careless work, Kelyng would not accept a verdict of manslaughter and threatened the jury with a fine. This produced the result he wanted: murder was found and the defendant was hanged in spite of the recommendation of 'gentlemen' of the county that he be spared." T. Green, *Verdict According to Conscience* 214 (1985) (hereinafter Green II).

The charges against Kelyng led to a House of Commons resolution that a bill should be drafted to the effect that threatening jurors with fines and imprisonment as a result of their verdicts was illegal. Although the bill never passed, the Court in *Bushell's Case*, 6 Howell's State Trials 999 (1670) (No. 231), decided three years later, explicitly held that a judge could not fine or imprison the jurors because he disagreed with their verdict. Over the next hundred years, the holding in *Bushell's Case* was extended to provide the jury with authority to determine facts without judicial interference. *See* Langbein, *Criminal Trial, supra,* at 298.

Thus, by the time our Bill of Rights was adopted, the jury's authority to determine facts in homicide cases was well established. Although judges retained some discretion to spare offenders convicted of capital offenses, the jury's power to determine whether the defendant committed the capital offense was absolute. In making this determination, the jury had to decide both whether the defendant killed the victim and whether he had the mental state necessary to be convicted of the capital offense.

(2) The Jury's Role in Seditious Libel Cases

The seditious libel cases of the eighteenth century are of special significance because they involved a serious and prolonged debate concerning the allocation of fact-finding authority between judges and juries. Moreover, in view of the framers' special concern for laws that restricted freedom of speech, this debate undoubtedly played an important part in shaping the framers' view of the jury's role in fact-finding. *See generally* Nelson, *Seditious Libel in Colonial America,* 3 Am. J. Legal Hist. 160 (1959).

Seditious libel was originally a common law crime. Thus, its elements were not authoritatively set down but evolved over the course of time. In order to establish seditious libel in England during the eighteenth century, the prosecution had to prove at least that the writing in question was seditious and that the defendant's act of publishing it was malicious. The jury's role in fact-finding was extremely limited, however. It was required to return "a general verdict of 'guilty' if it found that the accused intentionally published the writing and that the writing bore the meaning alleged by the prosecution." Green II, *supra,* at 319. In the event of a guilty verdict, the judge would then resolve the ultimate question of guilt or innocence by determining "as matters of law two questions that had the appearance of questions of fact: whether the act was done with criminal intent, and whether the writing was seditious or defamatory." *Id.*

The jury's limited role in fact-finding was attacked primarily on the ground that as "judges of fact . . . the

jury must consider all the 'circumstances,' (e.g., truth, intent) involved." *Id.* at 323. Significantly, lawyers and scholars making this argument sometimes drew upon the jury's role in homicide cases as an appropriate analogy. Since juries determined facts relating to the defendant's state of mind in those cases, so the argument went, there was no reason why they should be precluded from doing so in libel cases. In the *Trial of John Peter Zenger*, 17 Howell's State Trials 675 (1735) (No. 490), for example Zenger's lawyer, Andrew Hamilton, argued that:

> [U]pon indictment for murder, the jury may, and almost instantly do, take upon them to judge whether the evidence will amount to murder or manslaughter, and find accordingly; and I must say I cannot see why in our case the jury have not at least as good a right to say whether our newspapers are a libel or no libel as another jury has to say whether killing of a man is murder or manslaughter.
>
> J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger*, 91 (S. Katz 2d ed. 1972).

In Zenger's case, the judge refused to allow the jury to decide whether the words were libelous. Nevertheless, Hamilton argued to the jurors that they should acquit because they were themselves "witnesses to the truth of the facts we have offered." V. Buranelli, *The Trial of Peter Zenger* 112 (1957). After hearing this argument, the jury needed only a few minutes to acquit.

By the time the Bill of Rights was adopted, specific results – such as those in Zenger's case – as well as powerful arguments by authorities such as Lord Camden and Lord Erskine established that the jury's fact-finding role in libel cases could not be restricted. *See* Green II,

supra, at 320-23. The right to jury trial incorporated in the Sixth Amendment thus reflects the framers' contemporary understanding of the jury's role. Accordingly, it is evident that the Sixth Amendment right to jury trial necessarily includes the right to have a jury determination with respect to every element of the criminal charge. Thus, the legislature may not restrict a criminal defendant's right to jury trial by reallocating fact-finding authority between the judge and jury.

B. The Prior Decisions of This Court

A discussion of three particular recent opinions of this Court will be useful in isolating the key question presented in this case. *Spaziano v. Florida*, 468 U.S. 447 (1984) held that a capital defendant does not have a constitutional right to jury determination as to sentence and *Hildwin v. Florida*, 109 S. Ct. 2055 (1989) merely applied *Spaziano*. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), held that in certain situations the defendant is not entitled to a jury determination as to facts that lead to an enhanced sentence. None of these cases dealt with the issue presented in this case; nor did any of them develop a test for determining when a defendant will have a constitutional right to a jury determination as to facts that lead to a capital sentence.

Spaziano involved the constitutionality of Florida's capital sentencing scheme which provides that, after hearing evidence and argument relating to aggravating and mitigating circumstances, the jury recommends a sentence; then, after considering the jury's sentence, the

judge imposes sentence.[4] In Spaziano's case after weighing the evidence presented at the penalty trial, the jury recommended a sentence of life imprisonment. The trial judge concluded, however, that "notwithstanding the recommendation of the jury, . . . sufficient aggravating circumstances existed to justify and authorize a death sentence; . . . [and] the mitigating circumstances were insufficient to outweigh such aggravating circumstances . . . " 468 U.S. at 452. Specifically, the judge determined that two aggravating circumstances – that the homicide was especially heinous and atrocious and that the defendant had been previously convicted of a felony – were present and that there were no mitigating circumstances "except, perhaps, the age [28] of the defendant." *Id.*

In deciding the issue in *Spaziano*, this Court did not focus on the particular aggravating circumstances identified by the trial judge, but instead considered the broad question whether "the capital sentencing decision is one that, in all cases, should be made by a jury." 468 U.S. at 458.[5] After considering the general characteristics of

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[4] Although Florida law allows the judge to impose a sentence of death even where the jury recommends life, the judge must give great weight to the jury's recommendation. As this Court observed in *Proffitt v. Florida*, 428 U.S. 242 (1976), under the Florida procedure: " '[i]n order [for the court] to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Id.* at 249 (quoting *Tedder v. State*, 322 So.2d 908, 910 (1975)).

[5] The brief filed on behalf of Spaziano argued that "a trial judge's override of a jury's factually based decision against the

(Continued on following page)

capital sentencing, the Court held that a capital defendant does not have a constitutional right to jury trial at the penalty phase of a capital trial. Its basis for this holding was that the judge, as well as a jury, is able to fulfill the constitutional obligation of "evaluat[ing] the unique circumstances of the individual defendant" so as to impose sentence. 468 U.S. at 459.

The Court's analysis in *Spaziano* focused on the difference between sentencing and adjudicating guilt. Citing *Williams v. New York*, 337 U.S. 241 (1949), it emphasized that "despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding – a determination of the appropriate punishment to be imposed on an individual." 468 U.S. at 459. Thus, *Spaziano*'s holding seemed to be based on the conclusion that the kind of determination that takes place at the penalty stage under Florida's capital sentencing scheme is fundamentally different from the type of determination that takes place at the guilt stage of a criminal trial. Although the Florida sentencing judge is not permitted to impose a death sentence without making certain factual determinations, the Court did not focus on this aspect of Florida's sentencing procedure. Instead, it treated the case as one in which the judge determined whether a death sentence would be imposed primarily on the basis of his assessment of the individual characteristics of the particular offender.

(Continued from previous page)

death penalty must, in all cases, violate the Fifth, Sixth, Eighth and Fourteenth Amendments." Brief for Petitioner at 20. The parties did not raise the issue whether the defendant had the right to a jury trial as to the presence or absence of one or more of the statutorily defined aggravating circumstances.

In *Hildwin v. Florida*, 109 S. Ct. 2055 (1989) this Court appeared to read *Spaziano* broadly by stating that the "existence of an aggravating factor [under Florida's capital sentencing statute] is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.' " 109 S. Ct. at 2057 (quoting *McMillan v. Pennsylvania*, 477 U.S. at 86). *Hildwin*'s holding did not purport to go beyond *Spaziano*, however. In *Hildwin*, the jury recommended death. Under the Florida jury instructions, the jury could not have done so unless it found one or more statutory aggravating circumstances sufficient to call for the death penalty. Therefore, *Hildwin* could not present the issue of the constitutionality of a death sentence unsupported by a jury finding of the aggravating circumstance or circumstances that made the defendant death-eligible. And the Court's *per curiam* opinion itself recognized the narrowness of the issue presented. It held:

> "If the Sixth Amendment permits a judge to impose a sentence of death when a jury recommends life imprisonment, . . . it follows that it does not forbid the written findings that authorize imposition of a death sentence *when the jury unanimously recommends death.*" 109 S. Ct. at 2056 (emphasis added).

That language says explicitly that the *Hildwin* jury's death verdict makes his case follow *a fortiori* from *Spaziano*.

Unlike *Spaziano* and *Hildwin*, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), involved a situation in which an enhanced sentence was triggered entirely by a specific finding of fact. In *McMillan* the defendant was convicted of robbery, a felony subject to a maximum sentence of

twenty years in prison. He was sentenced under Pennsylvania's mandatory minimum sentencing act, which provides that anyone convicted of a felony will be given a mandatory minimum of five years imprisonment if the judge finds by a preponderance of the evidence that the defendant "visibly possessed a firearm" during the commission of the offense. The defendant claimed that "visible possession of a firearm" was an element of the offense, requiring both jury trial and proof beyond a reasonable doubt.

This Court held that the case was controlled by *Patterson v. New York*, 432 U.S. 197 (1977). The five-Justice majority focused first on the specific provisions of the Pennsylvania statute: "the Pennsylvania legislature has expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute, . . . but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt." 477 U.S. at 86. Acknowledging that *Patterson* does impose some constitutional limit on the government's power to base an increased sentence on factors that could have been defined as elements of a criminal offense, the majority concluded that this limit was not transgressed in *McMillan*.

The majority based this conclusion primarily on two factors. First, it emphasized that in contrast to the situation in *Specht v. Patterson*, 386 U.S. 605 (1967)[6] or *Mullaney*

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[6] *Specht* held that Colorado's Sex Offender's Act, which allowed a judge to sentence a convicted sex offender to an indeterminate sentence on the basis of a finding that the defendant was a threat to the public, an habitual offender, or mentally ill, violated due process.

v. Wilbur, 421 U.S. 684 (1975)[7], the stakes for the defendant were quite minimal: "[The Pennsylvania statute] neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." 477 U.S. at 88. In addition, the Court observed that "the specter . . . of States restructuring existing crimes in order to 'evade' the commands of *Winship* just does not appear in this case" because, in passing its Mandatory Minimum Sentencing Act, "[t]he Pennsylvania legislature did not change the definition of any existing offense." *Id.* at 89.

After stating that these differences between the present case and *Mullaney* and *Specht* were "controlling," the Court observed that its "inability to lay down any 'bright line' test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results." *Id.* at 91.

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[7] *Mullaney* held that Maine's homicide statute, which required a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" to reduce a homicide charge from murder to manslaughter, violated due process.

The Court's analysis in these cases reaffirms the traditional, steadfast rule, reflected in *Mullaney*, *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *In re Winship*, 397 U.S. 358 (1970), that a criminal defendant has the right to a jury trial as to the facts that constitute elements of a criminal offense. Although *Spaziano* holds that a capital defendant has no right to a jury trial as to sentence, it does not determine the circumstances under which a defendant will have a right to jury trial as to facts that lead to an enhanced sentence.

McMillan, which deals with the latter question, holds that a defendant has no absolute right to a jury trial as to facts that trigger a minimum mandatory sentence, but *McMillan* takes pains to limit its holding to the particular facts in that case. Based on *McMillan*'s analysis, the scope of a defendant's constitutional right to jury trial as to facts that trigger an enhanced sentence appears to depend on various factors, including the magnitude of the sentence enhancement and the sentencing provision's legislative history.

However, neither *McMillan* nor any of this Court's other decisions purport to develop a test for determining when a defendant will have a right to jury determination as to facts that lead to an enhanced sentence.[8]

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[8] This Court has discussed some of the issuses implicated by judicial fact-finding in *Cabana v. Bullock*, 474 U.S. 376 (1986). *Cabana* reaffirmed the right to a jury trial on elements of the crime. *Id.* at 715. The issue in *Cabana*, however, was whether a defendant has a right to a jury determination of the findings required by *Enmund v. Florida*, 458 U.S. 782 (1982). This Court concluded that because the Eighth Amendment principles in

(Continued on following page)

C. A Proposed Test for Determining a Capital Defendant's Right to Jury Fact-finding.

In constructing a constitutional role for the jury, the established boundaries – supported by history as well as current Supreme Court authority – are that the defendant has a right to jury trial as to facts that are elements of a criminal offense but not as to sentencing. Moreover, as *McMillan* implies, some limits must be placed on the legislature's authority to redefine elements of an offense as factors to be considered only at sentencing. Otherwise, by restructuring crimes so that facts that traditionally lead to enhanced criminal liability are changed to sentencing factors, the legislature could eliminate the defendant's right to a jury determination as to any facts beyond the minimum necessary to establish criminal liability. The crime of homicide, for example, could be redefined as unlawfully killing another, with traditional *mens rea* elements, such as malice or recklessness redefined as sentencing factors to be determined by the judge.

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Enmund do "not concern the guilt or innocence of the defendant" and "establishes no new elements of the crime of murder," there was no right to a jury trial on this issue. 474 U.S. at 715. Indeed, "*Enmund* 'does not affect the state's definition of any substantive offense, even a capital offense.' " *Id.* at 715-16 (quoting *Raddix v. Thigpen*, 728 F.2d 705, 709 (5th Cir. 1984). Thus, *Cabana* never addressed the issue presented here: whether the state may deny the right to a jury trial on elements that, under state law, determine whether a defendant is guilty of capital murder.

One principle that emerges from the seditious libel law controversy is that facts pertaining to the *actus reus* and *mens rea* of the offense must be treated as elements of the offense to be determined by the jury. In libel cases, for example, the defendant's right to a jury trial includes the right to a jury determination as to whether the defendant wrote the offending publication and whether he had the requisite criminal intent. In homicide cases, the defendant has the right to a jury determination as to whether he killed the victim and whether he had the requisite mental state to be found guilty of murder or manslaughter.

In the libel cases, of course, the factual elements to be determined are necessarily elements of the offense; in the absence of a finding that the defendant wrote the offending publication with the requisite criminal intent, the defendant would not be guilty of any crime. In homicide cases, however, the jury's determination as to the defendant's mental state is likely to affect the degree of the offense rather than the question of whether the defendant is guilty of any offense at all.

In situations where a factual determination leads to conviction of a greater offense (or enhanced sentencing) as opposed to the mere conviction of an offense, when should that determination be treated as an element of the offense as opposed to a factor to be considered at sentencing? Based on decisions of this Court, as well as the historical concerns that underlie the right to jury trial, *Amici* submit that the following test is appropriate: Facts that lead to an enhanced sentence must be viewed as elements of an offense for which a jury determination is required if two conditions are met. First, the facts relate to the circumstances of the crime rather than the character of the offender; second, proof of the facts makes possible a significantly enhanced sentence.

This approach is consistent with the framers' probable view of the jury's fact-finding role. In eighteenth century jury trials, the norm was for the jury to determine the facts relating to any circumstance of the offense that had a bearing on the defendant's criminal liability, including facts that would magnify the degree of the offense, and thereby increase the likelihood of a significantly enhanced sentence when measured by either the actual punishment imposed or the stigma that attached to conviction. In homicide cases, for example, the jury would decide whether the defendant was guilty of manslaughter or murder, two offenses that carried significantly different punishments and markedly different stigmas.

The focus upon whether the facts related to the circumstances of the offense rather than the character of the offender also corresponds with the jury's historical role. In the Middle Ages, jurors were selected because of their special knowledge of the crimes committed. Thus, these jurors' fact-finding authority naturally extended to all of the circumstances of the crime. By contrast, judges would decide whether the defendant was eligible for benefit of clergy, a determination largely dependent on an appraisal of the defendant's personal characteristics.

The test is also consistent with modern Supreme Court authority. In *Specht v. Patterson*, 386 U.S. 605 (1966), the Court held that a defendant is entitled to constitutional safeguards at sentencing when enhanced sentencing (in that case an increase of the maximum sentence from ten years to life imprisonment) is based on "a new finding of fact . . . that was not an ingredient of the

offense charged." *Id.* at 608. In *Specht*, the right to jury trial was not included within these constitutional safeguards because the Court had not yet held that the right to jury trial applies to the states through the Due Process Clause of the Fourteenth Amendment. *Specht*, together with *Duncan v. Louisiana*, 391 U.S. 145 (1968), seems to establish that the defendant has a right to jury trial at sentencing as to facts that are required to make the defendant eligible for the death penalty.

As explained earlier, this Court's decisions in *McMillan v. Pennsylvania, supra,* and *Spaziano v. Florida, supra,* are not to the contrary. In *McMillan,* the Court emphasized that the enhanced sentence resulting from the finding of fact in that case was relatively insignificant in comparison to the sentence enhancements involved in the cases of *Specht* or *Mullaney v. Wilbur*. Thus, the Court left open the question whether a defendant will have the right to a jury determination as to a fact relating to the circumstances of the offense that leads to a substantial sentence enhancement.

In *Spaziano*, the Court's decision that jury sentencing was not required at the Florida penalty stage was based on its conclusion that this sentencing proceeding "involves the same fundamental issue involved in any other sentencing proceeding – a determination of the appropriate punishment to be imposed on an individual." 468 U.S. at 459. Although Florida's sentencing statute does require the sentencing judge to make findings on aggravating and mitigating circumstances, the petitioner in *Spaziano* did not challenge this aspect of the Florida sentencing procedure. Moreover, the death penalty before the Court in *Spaziano* could have been predicated on a

finding that pertained to the characteristics of the defendant rather than the circumstances of the offense.[9] Thus, the Court's holding that a capital defendant is not constitutionally entitled to jury sentencing seemed to be premised on the conclusion that capital sentencing essentially involves a "largely moral judgment of the defendant's desert," *Caldwell v. Mississippi*, 472 U.S. 320, 341 n.7 (1985), rather than a determination of facts that pertain to the circumstances of the offense.

D. The Jury Trial Right in the Present Case.

Applying the test to the *Walton* case indicates that the Arizona Supreme Court erred in rejecting petitioner's Sixth Amendment challenge. Under the Arizona statute, a capital defendant may not be sentenced to death unless at least one aggravating circumstance is found to exist. See

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[9] The first of the two aggravating circumstances found to exist in *Spaziano* – that the defendant had a prior felony conviction – related to the character of the offender rather than the circumstances of the offense. Based on the Court's decision in *Barclay v. Florida*, 462 U.S. 939 (1983), a Florida death penalty will be constitutional if the sentencer determines that at least one valid aggravating circumstance is present even though one of the other aggravating circumstances weighed against the mitigating circumstances is invalid. Therefore, in *Spaziano* it would be unnecessary to determine whether the second aggravating circumstance – relating to whether the crime was heinous or atrocious – was invalid because it was determined to exist by a judge rather than a jury; under *Barclay*, the death penalty could stand on the basis of the aggravating circumstance that related to the character of the offender and therefore, under the proposed test, could be found to exist by a judge.

Ariz. Rev. Stat. Ann. Sec. 13-703(E) (1978). The aggravating circumstances are specific, enumerated factual findings that define the act of capitally eligible murder, an act which, until the Legislature intervened in the 1970s, was always within the jury's province to find under Arizona law.[10] In Walton's case, the trial judge concluded that two aggravating circumstances were present: first, the defendant "committed the offense in an especially heinous, cruel, or depraved manner;" and, second, "he did so for pecuniary gain." Obviously, both of these aggravating circumstances pertain to the defendant's actions, and his mental state at the time he participated in the killing of the victim. Thus, the first prong of the proposed test is met, in that the facts to be determined relate to the circumstances of the offense.

The second prong of the test is also easily met. A finding that one of the aggravating circumstances exists enhances the defendant's potential sentence from twenty-five years to execution. In view of this Court's repeated statements that the sentence of death is qualitatively different from a sentence of any term of imprisonment, *see, e.g., Solem v. Helm*, 463 U.S. 277, 294 (1982); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1975), it is scarcely necessary to argue that this increase constitutes a significantly enhanced sentence. A capital crime is immeasurably more serious than a non-capital crime.

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[10] From 1901 to 1973, Arizona law delegated to the jury all decisions on the nature and degree of an unlawful killing, including whether the crime was mitigated by excuse or justification, and whether a capital sentence was appropriate. *See Adamson v. Ricketts*, 865 F.2d 1011, 1024-25 (9th Cir. 1988).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court conclude that the Arizona death penalty statute violates the Sixth Amendment.

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